No. 06-637

IN THE

Supreme Court of the United States

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Petitioner,

v.

TOM F., on behalf of GILBERT F., a minor,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether the 1997 Amendments to the Individuals with Disabilities Education Act ("IDEA") created a categorical bar excluding children who have not previously attended a public school – but whose public school districts have failed to provide them with a free and appropriate public education – from receiving the long-established tuition reimbursement remedy authorized by IDEA and this Court's decisions in *Florence County School District Four v. Carter*, 510 U.S. 7 (1993) and *School Committee of Burlington, Mass v. Department of Education*, 471 U.S. 359 (1985).

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STATEMENT OF THE CASE

I. Statutory Background

This case presents the question of whether 1997 amendments to IDEA implicitly require that parents place their disabled children in inadequate and inappropriate public school placements for some indeterminate period of time in order to qualify for the private school tuition reimbursement remedy authorized by IDEA and this Court's decisions in *Florence County School District Four v. Carter*, 510 U.S. 7 (1993) ("*Carter*") and *School Committee of Burlington, Mass. v. Department of Education*, 471 U.S. 359 (1985) ("*Burlington*").

Congress enacted IDEA

> to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs . . . [,] to ensure that the rights of children with disabilities and parents of such children are protected[,] and . . . to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities. 20 U.S.C. §1400(d)(1).

Because "IDEA was intended to ensure that children with disabilities receive an education that is both appropriate and free," *Carter*, 510 U.S. at 13; *Burlington*, 471 U.S. at 372, a State's eligibility for IDEA funding is contingent on making available such an education "to all children with disabilities." 20 U.S.C. §1412(a)(1).

The "*modus operandi* of the Act" and "the core of the statute" is the "individualized educational program" ("IEP") "developed jointly by a school official qualified in special education, the child's teacher, the parents or guardian, and where appropriate, the child." *Burlington*, 471 U.S. at 368;

Schaffer v. Weast, 126 S. Ct. 528, 532 (2005). The IEP is a "comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs." *Burlington*, 471 U.S. at 368. As this Court recently stated in *Winkelman v. Parma City School District*, the IEP "sets the boundaries of the central entitlement provided by IDEA: It defines a "'free appropriate public education'" for that parent's child." 127 S. Ct. 1994, 2004 (2007).

Parents who believe that an IEP issued by a school district does not offer a "free and appropriate public education" ("FAPE") to their child are entitled, under IDEA, to "an impartial due process hearing" before a State educational agency at which they may raise "any matter relating to the identification, evaluation, or educational placement of the[ir] child, or the provision of a free appropriate public education to [their] child." In resolving a challenge to the adequacy of an IEP, a hearing officer must determine whether the proposed program offers the child "a free appropriate public education." "Any party aggrieved by the findings and decision" of the administrative tribunal may bring a civil action in state or federal court. 20 U.S.C. §§1415(f)(1)(A) and (E), (b)(6)(A), (i)(2)(A).

Where parents believe that a school district's IEP does not provide FAPE, they may enroll their child in private school and seek retroactive tuition reimbursement. If a court determines that a school district's IEP did in fact offer FAPE to the child, the parents will not receive tuition reimbursement. *Burlington*, 471 U.S. at 373; 20 U.S.C. §1412 (a)(10)(C)(i). Where a "court concludes both that the public placement violated IDEA and that the private school placement was proper under the Act," however, parents are "entitled to [tuition] reimbursement." *Carter*, 510 U.S. at 15. In determining the amount of reimbursement, courts are

directed to factor in "equitable considerations," including whether "the cost of private education was unreasonable." *Id.* at 16.

II. Factual Background

A. Tom F. Gives Notice That Special Education Is At Issue And Fully Cooperates With The Board's Attempts To Provide FAPE

Gilbert F. was born on October 1, 1989, and lives with his father, Tom F., in New York City. When Gilbert was a toddler, his father observed behavior indicating that Gilbert might suffer from a learning disability. Medical tests and analyses – as well as evaluations later conducted by New York City Board of Education ("Board") specialists – confirmed that Gilbert suffered from attention deficit hyperactivity disorder and other learning disabilities. (A. 149, 223, 242).[1]

In 1996, Tom F. asked the Board to evaluate Gilbert and issue an IEP designed to meet his educational needs. Gilbert was subsequently tested and evaluated by Board psychologists, speech and language pathologists, occupational therapists, educational evaluators and special education teachers, and by the Board's Committee on Special Education ("CSE"). The CSE then issued an IEP classifying Gilbert as learning disabled and recommending that he receive speech and language therapy, counseling, and other services. (A. 175). Believing that the IEP proposed by the Board was inappropriate for Gilbert, Tom F. – in accordance with the procedures set forth in IDEA, *Carter*, and *Burlington* – arranged for Gilbert to be taught at the Stephen Gaynor School, a private school that specializes in educating children

[1] "J.A." refers to the Joint Appendix; "A." refers to the Joint Appendix filed in the Second Circuit; "Br." refers to Petitioner's merits brief.

with learning disabilities – and sought tuition reimbursement for the 1997-98 school year. The Board chose not to defend the adequacy of the IEP it had prepared for Gilbert, and instead entered into a settlement agreement with Tom F. in which it agreed to reimburse Gilbert's Gaynor tuition for that year. (A. 5, 11).

In 1998 – in preparation for the 1998-99 school year, the Board's psychologists, speech and language pathologists, and other special education experts again evaluated and assessed Gilbert, and the CSE issued another IEP. Tom F. concluded that this IEP was likewise inappropriate for Gilbert, and the Board again decided not to defend its adequacy, entering into a settlement in which it agreed to tuition reimbursement for the 1998-99 school year. (A. 14-20).

Throughout 1998 and the first half of 1999, Gilbert was again periodically tested, assessed, and observed by Board speech and language pathologists, psychologists, occupational therapists, and special education experts. On April 10, 1999, for example, Gilbert's skills in reading comprehension, reading decoding, spelling, and math computation were assessed; he received a new psychological evaluation and took IQ tests; and he was assessed by an occupational therapist and a speech and language pathologist. (J.A. 67a-69a).

On June 23, 1999, the Board's CSE met to consider the results of these assessments and to develop an IEP for Gilbert for the 1999-2000 school year. Tom F. attended and fully participated in this meeting.[2] (A. 150). Following this

[2] The Board notes (Br. 7) that the CSE's May 28, 1999 meeting was postponed "due to the unavailability of a parent member." The "unavailable" parent member was not Tom F., but the parent of another student with a disability whom the Board was required to have present. (J.A. 33a-34a); N.Y. COMP. CODES R. & REGS. tit. 8, § 200.3(a)(1)(viii) (describing required composition of CSE).

meeting, the Board issued an IEP but recommended no specific placement for Gilbert. It was not until July 31, 1999, shortly before the beginning of the school year, that the Board informed Tom F. that Gilbert would be placed at P.S. 871.[3]

Tom F. believed that the Board's IEP for the 1999-2000 school year was inappropriate, in part because it directed that Gilbert – who was performing at a fourth-grade level in math – be assigned to either a class performing at kindergarten level or to a class of gifted fourth graders that would have exceeded Gilbert's skills and abilities. Accordingly, Tom F. requested an impartial review to determine the appropriateness of the placement, and Gilbert remained enrolled at Gaynor.[4]

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[3] The Board argues that Congress intended to "encourage mainstreaming of students wherever practicable," and that the Court of Appeals gave this factor insufficient weight. (Br. 2, 19, 27, 36-37). P.S. 871, the "New York City Lower Lab School for Gifted Education," did not offer a mainstreaming alternative to Gilbert, however. P.S. 871 was a school for *gifted* children, located in a building with two self-contained special education classes for disabled children, where Gilbert would have been taught. Indeed, the Board's IEP for the 1999-2000 school year states that "Gil's learning needs could not be address[ed] appropriately in the mainstream," and the hearing officer's decision notes that the Board never "indicated that Gilbert was to be mainstreamed." (A. 168; J.A. 34a). Accordingly, the Board's "mainstreaming" argument is a red herring. In any event, the mainstreaming goal cannot be used to frustrate IDEA's primary objective of providing FAPE to children with disabilities. *See Burlington*, 471 U.S. at 369 ("The Act contemplates that [FAPE] will be provided where possible in regular public schools, with the child participating as much as possible in the same activities as nonhandicapped children, but the Act also provides for placement in private schools at public expense *where this is not possible*.") (emphasis added).

[4] The Board criticizes Tom F. for not visiting P.S. 871 (Br. 9, 13, 37), but the Board did not issue the P.S. 871 placement until July

(Cont'd)

III. Procedural History

A. Administrative Proceedings

An impartial hearing officer ("IHO") held a three-day hearing concerning Tom F.'s challenge to the IEP, and heard testimony from seven witnesses, including a Board educational evaluator, school psychologist, and special education teacher, Tom F., and several of Gilbert's Gaynor teachers. (J.A. 19a-32a). Applying the first prong of the *Carter/Burlington* test for evaluating tuition reimbursement claims, the IHO determined that the proposed placement at P.S. 871 was inappropriate to meet Gilbert's needs:

> Gilbert was deemed on a fourth grade level in math computation as of April, 1999, and yet the Board of Education deemed it appropriate to place Gilbert in a class where some children perform math at a kindergarten level (as measured in February 2000). The teacher sought to explain this discrepancy by indicating that the children work individually and then discuss their work in "circles," but it is not altogether clear what a higher functioning child would learn when kindergarten-level materials are being discussed in such circles. The teacher did mention that there is a child in such class with a math level akin to Gilbert's and that this child was mainstreamed into regular education (for math). However, it was not specifically indicated that Gilbert was to be mainstreamed for math. Nor was it satisfactorily explained how Gilbert could attend a fourth grade

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(Cont'd)

31, 1999, when the school was closed and there would have been nothing for a visitor to observe. More importantly, it was obvious from the face of the IEP that the proposed placement was not appropriate given, *inter alia*, the inappropriate math placement.

> level math class in a school for gifted children, where, presumably, the pace of the work would be much faster than usual and the [student/teacher] ratio would be larger than Gilbert could handle. As a result, I find the Board of Education has not offered an appropriate program and that the parent has met his burden on "prong one" [of the *Carter/Burlington* test]. (J.A. 34a-35a.)[5]

Applying the second prong of the *Carter/Burlington* test, which requires an inquiry into whether the private placement is appropriate for the child, the IHO found "more than sufficient testimony that the program at Gaynor is suiting Gilbert's needs and providing him with an appropriate education," noting significant improvement in Gilbert's word decoding, reading comprehension, math, and behavior.[6] The IHO likewise found that the equities favored reimbursement to Tom F., who "*did everything asked of him by the Board of Education in regard to this matter.*" (J.A. 35a-36a) (emphasis added). Accordingly, the IHO ordered the Board to reimburse Tom F. for Gilbert's Gaynor tuition for the 1999-2000 school year.

The Board appealed, and on March 30, 2001, a State Review Officer ("SRO") affirmed the IHO's determination that the Board had "failed to demonstrate the appropriateness

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[5] The IHO also noted that the Board had violated IDEA by failing to arrange for Gilbert's special education teacher to attend the CSE's IEP meeting. (J.A. 33a); *see also* 20 U.S.C. §1414(d)(1)(B)(iii) (requiring that IEP team include "at least one special education provider of such child").

[6] With respect to reading comprehension, for example, Gilbert had progressed from a mid-second grade level as of April 1999 to a grade level of 3.5 as of February 2000. The IHO attributed the improvement to "the thorough reading program at Gaynor, which includes an additional reading teacher and a speech and language therapist who works on [reading] skills." (J.A. 35a).

of its recommended program." The SRO further found that Gaynor was an appropriate placement, noting that the Board had "not challenged the hearing officer's finding that the educational services which Gaynor provided to respondent's son were appropriate for the student." As to equitable considerations, the SRO found that "there is no evidence in the record that respondent failed to cooperate with the CSE." The SRO also rejected the Board's argument that the tuition reimbursement remedy was unavailable because Gilbert had "not received special education services from a public agency," noting that this argument "has been considered and rejected in prior appeals."[7] (J.A. 74a-76a).

B. Court Proceedings

On July 26, 2001, the Board appealed to the U.S. District Court for the Southern District of New York, and on January 3, 2005, the court granted the Board's motion for summary judgment. The District Court did not consider the administrative tribunals' findings that the Board's proposed placement did not offer FAPE. Instead, in granting the Board summary judgment, the District Court held that the "clear implication

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[7] The SRO's case citations included *Application of a Child with a Disability*, Appeal No. 98-4 (*available at* http://www.sro.nysed.gov/1998/98-41.htm) in which an SRO noted that, ' prior to the enactment of the 1997 amendments to IDEA, it was well established that a board of education could be required to pay for the educational services obtained for a child by the child's parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations supported the parents' claim for reimbursement." After reviewing subsection (C)(ii) and its legislative history, the SRO rejected the Board's argument: "In the absence of clear evidence that Congress intended to limit the remedy of an award of tuition reimbursement to situations in which the child had previously been enrolled in a school district's special education program, I decline respondent's invitation to place such a limit upon the awarding of tuition reimbursement." *Id.* at 4.

of the plain language [of §1412(a)(10)(C)(ii)] . . . is that where a child has *not* previously received special education from a public agency, there is no authority to reimburse the tuition expenses arising from a parent's unilateral placement of the child in private school." *Board of Educ. v. Tom F.*, No. 01 Civ. 6845, 2005 WL 22866 (S.D.N.Y. Jan. 4, 2005) (A. 447) (emphasis in original).

Tom F. appealed the District Court's decision. While his appeal was pending, the Second Circuit issued *Frank G. v. Board of Educ.*, 459 F.3d 356 (2d Cir. 2006), *pet. for cert. filed*, 2006 WL 3075196 (Oct. 23, 2006) (J.A. 77a-115a) ("*Frank G.*"). As in *Tom F.*, the child in *Frank G.* had never attended public school, and the school district had provided an IEP that did not offer FAPE. *Frank G.*, 459 F.3d at 361. Nevertheless, the school district asserted that it had "an absolute legal defense" to the parents' claim for tuition reimbursement, arguing – like the Board here – that under §1412(a)(10)(C)(ii), "[o]nly after a learning disabled student enrolled in an inappropriate special education program offered by a public agency would his parents be free unilaterally to enroll him at an appropriate private school and seek reimbursement." *Id.* at 363, 365, 367.

Noting that the school district argued that §1412(a)(10)(C)(ii) should be read as "implicitly excluding reimbursement," the Second Circuit pointed out that the plain language of this provision does not exclude tuition reimbursement where a child has not previously received special education services in a public school:

> The plain language of 20 U.S.C. §1412(a)(10)(C)(ii) does not say that tuition reimbursement is *only* available to parents whose child had previously received special education and related services from a public agency, nor does it say that tuition reimbursement is not available to parents

> whose child had not previously received special education and related services. *Frank G.*, 459 F.3d at 368 (emphasis in original).

The Second Circuit then considered whether §1412(a)(10)(C)(ii) was intended to overrule *Burlington*'s interpretation of the broad equitable remedy in 20 U.S.C. § 1415(e)(2), which authorizes a district court to "grant such relief as [it] determines is appropriate," and which this Court relied on in granting the tuition reimbursement remedy. Given that §1415(e)(2) "was unchanged by the 1997 revision to IDEA," the Court noted that "it can be presumed that Congress intended to adopt the construction given to [§1415(e)(2)] by the Supreme Court and made that construction part of the enactment." *Id.* at 369-70.

With respect to the school district's "implicit exclusion" argument, the Court noted that the preceding subsection (§1412(a)(10)(C)(i)) – which provides that a school district is not required to "pay for the cost of education . . . of a child with a disability if that agency made a free appropriate public education available to the child and the parents elected to place the child in . . . private school" – implies "that reimbursement is available where, as here, the agency failed to make a free [appropriate] public education available to the child." *Id.* at 370.

The Second Circuit then considered IDEA's "primary purpose," and whether an interpretation requiring parents to place their disabled children in inappropriate public school placements as a prerequisite for tuition reimbursement is compatible with that purpose. Noting that this Court has repeatedly instructed that IDEA "was intended to give handicapped children both an appropriate education and a free one [, and that] it should not be interpreted to defeat one or the other of those objectives," the Second Circuit ruled that "the construction of §1412(a)(10)(C)(ii) that the School

District urges upon us would defeat both purposes of the IDEA." *Id.* at 372. As for the school district's argument, also made by the Board here, that children should be required to "try out" an inappropriate public school placement, the Second Circuit "decline[d] to interpret 20 U.S.C. § 1412(a)(10)(C)(ii) to require parents to jeopardize their child's health and education in this manner in order to qualify for the right to seek tuition reimbursement." IDEA, the Court held, does not require "[s]uch a 'first bite' at failure." *Id.*

On August 9, 2006, the Second Circuit disposed of *Tom F.* by summary order, vacating and remanding for further proceedings in light of *Frank G.* On November 1, 2006, the Board filed its certiorari petition, and on February 26, 2007, this Court granted the Board's petition.

SUMMARY OF ARGUMENT

In its certiorari petition, the Board repeatedly asserted that its IEP for Gilbert offered him FAPE.[8] In its merits brief, however, the Board has abandoned that argument. Instead, the Board contends that where a school district's IEP does *not* offer FAPE, parents must nonetheless enroll their child in that inappropriate placement for some indeterminate period of time in order to qualify for tuition reimbursement.[9]

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[8] *See, e.g.*, Pet. for Writ of Cert. at 8 ("the Board made a free appropriate public education available to the student"), 4 ("§1412(a)(10)(C)(ii) unambiguously precludes tuition reimbursement *where the public agency has made a free appropriate public education available to a student*"), 19 (requesting grant of certiorari to determine whether subsection (C)(ii) requires prior public school placement "*where the public agency has made a free appropriate public education available to the child*") (emphases added).

[9] Late in its brief (Br. 36), the Board asserts that it offered Gilbert a placement in "one of the finest schools in the New York City public school system," but the Board does not explain how the administrative tribunals erred in concluding that the IEP offered to Gilbert was inadequate, or why it would have been appropriate to place a child with fourth-grade math skills in a class with students performing at a kindergarten level.

Nothing in the plain language of IDEA, in its statutory purpose, in its legislative history, in its implementing regulations, or in this Court's or lower courts' jurisprudence supports the Board's callous "give it a try" argument. Indeed, there is perhaps nothing more antithetical to IDEA's statutory purpose and this Court's jurisprudence than forcing parents to place their child in an inappropriate public school placement in order to qualify for tuition reimbursement.

The 1997 Amendments at issue – subsection (C)(ii) and the discretionary limitations on reimbursement set forth in §1412(a)(10)(C)(iii) – require no such interpretation. These provisions did not effect a change in the law. Instead, they codified existing case law concerning parents' obligations to give notice that special education is at issue, and to cooperate with school districts' attempts to provide FAPE. These provisions also provide guidance to district courts exercising their broad equitable powers under §1415(e)(2), particularly in connection with making findings as to the reasonableness of parental actions.

Contrary to the Board's argument (Br. 18), this is not a case about whether "parents who have never given the local educational agency an opportunity to provide FAPE" qualify for tuition reimbursement. *Tom F. indisputably gave the Board an opportunity to provide FAPE.* He and his son fully participated in the Board's development of an IEP, met with Board psychologists, speech and language pathologists, occupational therapists, and educational evaluators, and met with the Board's CSE. In the words of the IHO, Tom F. "did everything asked of him by the Board of Education in regard to this matter." (J.A. 35a). Having given notice to the Board that Gilbert's special education needs were at issue, and having fully cooperated with the Board's efforts to develop

an IEP and provide FAPE to Gilbert, Tom F. was not required under IDEA to "give the public school's placement a try." (Br. 22). Instead, Tom F. was authorized under IDEA, its regulations, and this Court's decisions in *Burlington* and *Carter* to place Gilbert in private school and to challenge the appropriateness of the IEP through IDEA's administrative process.

The additional hurdle that the Board seeks to impose – receipt of special education services in a public school for some unspecified period of time – is not required by IDEA or this Court's precedents, has been explicitly rejected by the U.S. Department of Education, would produce absurd results, and threatens serious harm to children with disabilities by requiring their parents to subject them to inappropriate educational placements at pain of forfeiting rights to tuition reimbursement. This is precisely the "Hobson's choice" denounced in *Burlington*, and nothing in the 1997 Amendments to IDEA or in their legislative history suggests that Congress intended to overrule *Burlington* and impose such a choice on parents.

The Board's interpretation of IDEA reflects a basic misunderstanding as to when a FAPE determination is made. Under IDEA, parents have the right to administratively challenge "any matter relating to the identification, evaluation, or educational placement of the[ir] child, or the provision of a free appropriate public education to such child." §1415(b)(6)(A). Accordingly, once an inadequate IEP has been provided, parents may seek a ruling as to whether it offers FAPE. They are not required to also "try" the public school placement. A contrary rule would render the IEP process – which this Court has described as the "*modus operandi* of the Act" and "the core of the statute," *Burlington*, 471 U.S. at 368; *Schaffer*, 126 S.Ct. at 532 – meaningless.

Finally, the Board's Spending Clause challenge – not raised below and therefore waived – is easily answered. School districts have been on clear notice at least since *Burlington* that they are potentially liable for private school tuition reimbursement if they fail to provide FAPE. Unlike *Arlington Central School District Board of Education v. Murphy*, where this Court concluded that state officials had no notice of an obligation to compensate prevailing parents for expert fees, 126 S. Ct. 2455 (2006), no state official could plausibly claim ignorance here as to whether liability for tuition reimbursement could flow from a determination that a school district's IEP did not offer FAPE.

ARGUMENT

I. The Plain Language Of §1412(a)(10)(C)(ii) Does Not Impose A Mandatory Public School "Try-Out" Period As A Prerequisite For Tuition Reimbursement

A. The Board Has No "Plain Language" Argument

The Board's argument that Congress intended that parents be forced to place their children in inappropriate public school placements in order to qualify for tuition reimbursement is premised on a 1997 amendment to IDEA codified at 20 U.S.C. §1412(a)(10)(C)(ii):

> If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a FAPE available to the child in a timely manner prior to that enrollment.

The Board contends that the "plain language" of this provision "creates a threshold requirement that tuition reimbursement is only available for children who have previously received special education and related services *while in the public school system*." (Br. 22) (emphasis added).[10] The Board further contends that Congress intended subsection (C)(ii) to "require[] that the parent first give the public school's placement a try," and to "limit[] the relief that may be granted pursuant to §1415(e)(2) [now §1415(i)(2)(C)(iii)]" and *Burlington*. (Br. 22, 24).

While the Board repeatedly asserts that it is making a "plain language" argument, it is actually fabricating statutory "requirements" out of whole cloth. Subsection (C)(ii) does not say that tuition reimbursement is available only to parents whose children previously received special education and related services from a public agency, nor does it say that this remedy is unavailable to parents whose child has not previously received such services. Similarly, it does not state that such services must be received "while in the public school system," nor does it mention a mandatory public school "try-out" period. Finally, subsection (C)(ii) does not state that it limits the remedies available under §1415(e)(2) and *Burlington*.

As in *Winkelman*, and as the District Court (A.447) and the Second Circuit recognized (459 F.3d at 368), the Board is actually arguing that subsection (C)(ii) "*sub silentio* or by implication bar[s] parents from seeking to vindicate the rights [previously] accorded to them" under IDEA. *Winkelman*, 127 S. Ct. at 2002. As *Winkelman* cautions, however, courts asked

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[10] *See also* Br. 21 ("the 1997 amendments expressly limit the availability of tuition reimbursement to children who received special education services *from the public school*"); Br. 33 ("the 1997 amendments expressly limit the availability of the tuition remedy to children who received special education services *at the public school*") (emphases added).

to find that IDEA provisions implicitly limit parents' rights – particularly in connection with the right "most fundamental to the Act: the provision of a free appropriate public education to a child with a disability" – must carefully consider whether such an interpretation "would be inconsistent with the statutory scheme." *Id.* at 2004, 1996. In *Winkelman*, even though IDEA did not "mandat[e] in direct and explicit terms that parents have the status of real parties in interest," this Court – after a "consideration of the entire statutory scheme" – declined "to read into the plain language of the statute an implicit rejection" of the principle that parents enjoyed such rights. *Id.* at 1996, 2003.

In arguing that subsection (C)(ii) requires parents to place their children in inappropriate public school placements even after school districts have provided IEPs that do not offer FAPE, the Board does much more violence to IDEA's statutory purpose than the school district's parental standing argument in *Winkelman*. As we explain below, subsection (C)(ii) and the discretionary limitation on reimbursement provisions in §1412(a)(10)(C)(iii) do not effect a change in the law; instead, they codify *Burlington*, *Carter*, and their progeny by clarifying the nature of the notice and cooperation obligations parents owe school districts. While these provisions provide guidance to district courts exercising their broad equitable powers under §1415(e)(2), they do not *sub silentio* exclude children who have not previously received special education services in public school or impose a mandatory public school "try-out" period.

B. Section 1412(a)(10)(C)(ii) Codifies The *Burlington* Tuition Reimbursement Remedy And Does Not Bar A Subclass Of Children From Reimbursement

1. *Burlington* Granted The Tuition Reimbursement Remedy To Parents Such As Tom F. And Prohibits An Interpretation Of IDEA That Defeats The Act's Purpose Of Providing An Appropriate And Free Education To All Children With Disabilities

In *Burlington*, this Court held that children with disabilities are not required to continue in inadequate public school placements while their parents challenge school districts' failure to provide FAPE. Instead, parents can place their children in appropriate private schools without jeopardizing their ability to qualify for tuition reimbursement. *Burlington*, 471 U.S. at 374. Declining to interpret IDEA as forcing parents into a "Hobson's choice" – "go along with the IEP to the detriment of their child if it turns out to be inappropriate or pay for what they consider to be the appropriate placement" – this Court found that Congress "undoubtedly did not intend this result." *Id.* at 370. Speaking through then-Justice Rehnquist, this Court held that §1415(e)(2) (which empowers courts in actions challenging a denial of FAPE to "grant such relief as the court determines is appropriate") authorizes retroactive tuition reimbursement:

> A final judicial decision on the merits of an IEP will in most instances come a year or more after the school term covered by that IEP has passed. In the meantime, the parents who disagree with the proposed IEP are faced with a choice: go along with the IEP to the detriment of their child if it turns out to be inappropriate or pay for what they consider to be the appropriate placement. If they choose the latter course . . . it would be an empty victory to have a court tell them several years later

> that they were right but that these expenditures could not in a proper case be reimbursed by the school officials. If that were the case, the child's right to a *free* appropriate public education, the parents' right to participate fully in developing a proper IEP, and all of the procedural safeguards would be less than complete. Because Congress undoubtedly did not intend this result, we are confident that by empowering the court to grant "appropriate" relief *Congress meant to include retroactive reimbursement to parents as an available remedy in a proper case. Id.* at 370 (last emphasis added).

Thus, *Burlington* interpreted §1415 as authorizing courts to grant tuition reimbursement where (1) an IEP is inappropriate; (2) the private school placement is appropriate; and (3) equitable considerations favor granting relief. *Id.* at 370, 374. In reaching this result, this Court noted that IDEA "was intended to give handicapped children both an appropriate education and a free one; it should not be interpreted to defeat one or the other of those objectives." *Id.* at 372.

The Board's attempt to add a fourth prong to the *Carter/Burlington* test – a public school "try-out" period – directly contradicts this Court's teaching in *Burlington* that IDEA cannot be construed in a manner that makes parents choose between an appropriate education for their child and the relief to which they may be entitled under IDEA. Nothing in subsection (C)(ii) indicates that Congress intended to reinstate this "Hobson's choice" for a certain subclass of parents and children.

2. Section 1412(a)(10)(C)(ii) Codifies The *Burlington* Remedy And Court Decisions Requiring That A Parent Provide The School District With Notice That Special Education Is At Issue And An Opportunity To Offer FAPE

The Board argues that unless subsection (C)(ii) is read to impose a mandatory public school "try-out" period, it is a "nullity" and "surplusage." (Br. 18, 21, 24-25). This is nonsense. The language of subsections (C)(ii) and (iii) reflect an obvious effort to codify the holdings of *Burlington* and its progeny, particularly as to parents' obligation to give school districts an opportunity to offer FAPE.

Subsection(C)(ii) precisely tracks *Burlington*'s facts, circumstances, and result. That case involved a student with disabilities who had "previously received special education and related services under the authority of a public agency." *See Burlington*, 471 U.S. at 361-62. Dissatisfied with an IEP, the parents enrolled their child in a private school "without the consent of or referral by the public agency." *Id.* at 362. The school district was required "to reimburse the parents for the cost of that enrollment" because it "had not made a FAPE available to the child in a timely manner prior to that enrollment." *Id.* at 363. Accordingly, the language of subsection (C)(ii) reflects not an intention to impose a mandatory public school "try-out" period, but instead to codify the holding of a landmark Supreme Court case. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 251 (1994) (noting that specific provisions of a statute "were obviously drafted with 'recent decisions of the Supreme Court in mind'" because they were based on the specific factual situations present in those cases).

Subsection (C)(iii) – which gives guidance to courts on restricting reimbursement where parents have not acted reasonably in meeting their notice and cooperation

obligations – likewise codifies existing case law: "[b]efore the 1997 amendments to IDEA, several circuits had held that reimbursement for private school tuition depended on the parents cooperating with school authorities in determining the proper placement and educational plan for the child." *Greenland Sch. Dist. v. Amy N.*, 358 F.3d 150, 159 (1st Cir. 2004).[11] Accordingly, in listing in subsection (C)(iii) certain notice and cooperation factors that courts may consider in determining whether a parent has an equitable right to tuition reimbursement – including whether parents failed to (1) tell the school district at the IEP meeting that they were rejecting the placement and enrolling their child in private school, (2) provide written notice of this intent to the school district, (3) permit their child to be evaluated by the school district, or (4) act "[ ]reasonabl[y]" – Congress was codifying existing law. Nothing in subsection (C)(iii) indicates that Congress intended to impose a new, mandatory public school "try-out" period on parents seeking private school tuition reimbursement.

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[11] *See, e.g., Wise v. Ohio Dep't of Educ.*, 80 F.3d 177, 184 (6th Cir. 1996) (denying tuition reimbursement because parents never "made a formal complaint to [their school district] about their child's educational placement"); *Johnson v. Duneland Sch. Corp.*, 92 F.3d 554, 558 (7th Cir. 1996) (school district "cannot be forced to rely solely on an independent evaluation conducted at the parent's behest"); *Ash v. Lake Oswego Sch. Dist., No. 7J*, 980 F.2d 585, 589 (9th Cir. 1992) (denying tuition reimbursement where school district not given "a reasonable opportunity to complete the process of evaluating [the child] and making a placement recommendation"); *Evans v. Dist. No. 17*, 841 F.2d 824, 828-29 (8th Cir. 1988) (denying tuition reimbursement because parents "never made a request for a change in [their child's] placement"); *Salley v. St. Tammany Parish Sch. Bd.*, 1994 WL 148721 at *25 (E.D. La. Apr. 18, 1994) (denying reimbursement because "[t]he Board was in no position to provide a free and appropriate education to Danielle short of the full evaluation which the Salleys refused to permit"); *Fagan v. District of Columbia*, 817 F. Supp. 161, 165 (D.D.C. 1993) (reimbursement denied where parents "were primarily to blame for the failure to develop a new IEP").

Similarly, nowhere in §1412 did Congress indicate that it disapproved of, or intended to restrict, the scope of a District Court's equitable powers under §1415 or the breadth of remedies provided by *Burlington*, *Carter*, and their progeny, none of which indicates that a prior "try out" of a public school placement is necessary before tuition reimbursement can be granted. Without such express disapproval of the status quo,[12] this Court should not infer that Congress intended to effect the reversal of 20 years of judicial precedent. *See Cottage Savings Assoc. v Comm'r of Internal Revenue*, 499 U.S. 554, 561-62 (1991) (Where prior court decisions "were part of the 'contemporary legal context' in which Congress enacted" a particular statutory provision and Congress had left the principles "undisturbed" in subsequent amendments to the statute as a whole, the Court would "presume that Congress intended to codify these principles" in the statute.); *Johnson v. Manhattan Ry Co.*, 289 U.S. 479, 500 (1933) (When Congress re-enacts a piece of legislation without "any change indicative of disapproval of the prior [judicial] construction," "reenactment operates as an implied legislative approval of the prior construction".).

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[12] Both before and after the 1997 Amendments, numerous courts ruled that the reimbursement remedy was available whenever school districts had not offered FAPE, including when children had not previously attended public school. *See, e.g., Robertson County Sch. System v. King*, 1996 WL 593605 at *3, 5 (6th Cir. 1996); *Holland v. District of Columbia*, 71 F.3d 417, 418, 425 (D.C. Cir. 1995); *Gerisamou ex rel Gerisamou v. Ambach*, 636 F. Supp. 1504, 1507-08, 1511 (E.D.N.Y. 1986); *Hirsch v. McKenzie*, 1988 WL 49155, *1, *3 (D.D.C. 1988); *Shirk v. District of Columbia*, 756 F.Supp. 31, 33 (D.D.C. 1991); *Zakary M. v. Chester County Intermed. Unit*, 1995 WL 739708, *1, *5 (E.D. Pa. 1995); *see also Frank G., supra*; *M.M. v. School Board of Miami-Dade County*, 437 F.3d 1085 (11th Cir. 2006); *Justin G. ex rel. Gene R. v. Board of Educ. of Montgomery County*, 148 F. Supp. 2d 576, 587 (D. Md. 2001); *E.W. and E.W., ex rel. J.W. v. School Bd. of Miami-Dade County*, 307 F. Supp. 2d 1363, 1368 (S.D. Fla. 2004).

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When properly read together with §1415 and the Act as a whole, *see Winkelman*, 127 S. Ct. at 2000 (recognizing that a "proper interpretation" of IDEA "requires a consideration of the entire statutory scheme"), it is clear that §1412 was not intended to limit the remedies provided by §1415, but to clarify the obligations of parents and guide courts in exercising their discretion under §1415. Section 1412 requires parents to place their child's special education needs at issue and to provide a school district with a fair opportunity to attempt to provide FAPE. It does not categorically deny any parent whose child has never attended public school the opportunity to challenge an IEP and apply for tuition reimbursement.

3. Legislative History Does Not Indicate That Congress Added A Public School "Try-Out" Requirement And The Department Of Education Has Rejected This Interpretation

a. The Legislative History Does Not Support The Board's Interpretation

Legislative history concerning subsection (C)(ii) is sparse, but what does exist does not support the Board's interpretation. As the Second Circuit noted, "[t]he legislative history of the 1997 Amendments . . . is as significant for what it does not say as for what it does say." *Frank G.*, 459 F.3d at 374. In particular, there is no statement or suggestion in the legislative history that Congress intended to impose a mandatory public school "try-out" requirement.

The most pertinent legislative history merely restates the language of the statute and is consequently unhelpful. *See* H.R. Rep. No. 105-95 at 92 (1997); S. Rep. No. 105-17 at 13 (1997):

> Section 612 [20 U.S.C. §1412] also specifies that parents may be reimbursed for the cost of a private educational placement under certain conditions

> (i.e., when a due process hearing officer or judge determines that a public agency has not made a free appropriate public education available to the child, in a timely manner, prior to the parents enrolling the child in that placement without the public agency's consent). Previously, the child must have received special education and related services under the authority of a public agency.

As the Second Circuit noted, this "awkward paraphrase" of the statutory language "does not expressly exclude reimbursement where special education and related services have not been previously provided." *Frank G.*, 459 F.3d at 373-74.

Moreover, in codifying *Burlington* and its progeny, Congressional figures emphasized school districts' obligation to provide FAPE to every child with a disability. For example, while discussing "[c]hildren enrolled by their parents in private schools," Senator Harkin emphasized that "the bill *reiterates current policy* that a public agency is not required to pay for special education and related services at a private school *if that agency made a free appropriate public education available to the child.*" 143 Cong. Rec. S4300 (daily ed. May 12, 1997) (emphasis added).

The Board and its *amici* argue that subsection (C)(ii) was designed to reduce costs to school districts, and that the "try-out" requirement was part of a cost-savings effort.[13] But nowhere in the legislative history concerning subsection

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[13] Council of the Great City Schools ("Great City"), for example, argues (at 13, 18) that a statement by Representative Castle – part of a "top 10 list of reasons to support the bill ... deliver[ed] ... David Letterman style," 143 Cong. Rec. H2536 (daily ed. May 13, 1997) – shows that subsection(C)(ii) was part of a cost-cutting effort by Congress and was designed to eliminate the tuition reimbursement remedy for

(Cont'd)

(C)(ii) does Congress state that it is imposing a public school "try-out" requirement or abrogating relief to a certain subclass of parents and children, much less that it is doing so because of a concern about the financial burden that tuition reimbursement imposes on school districts. Indeed, the 1997 Amendments *increased* school districts' responsibilities to private school students, because they mandated that the amounts spent on special education services for such students be "proportionate" to the total amount of federal funds made available to the State.[14] 20 U.S.C. §1412(a)(10)(A)(i).

(Cont'd)
certain parents. There is no evidence that Rep. Castle's remarks were directed to subsection (C)(ii), however, much less that Rep. Castle was saying that subsection (C)(ii) lowered costs to school districts by requiring parents to "try out" a public school placement. Subsection (C)(iii) provides that courts may deny or reduce reimbursement where parents have acted "unreasonabl[y]," and Rep. Castle's remark could just as easily have referred to this provision.

The Board and its *amici* frequently misrepresent the legislative history or cite it out of context. For example, Great City claims that the legislative history of subsection (C)(ii) states that this provision was enacted "to clarify the responsibility of public school districts to children with disabilities who are placed by their parents in private schools" and that "[t]hese changes should resolve a number of issues that have been the subject of an increasing amount of litigation in the last few years." *See* Great City Br. at 9; S. Rep. No. 105-17 at 13. These statements refer to §1412(a)(10)(A), however – which relates to private school students who have not requested development of an IEP. They have nothing to do with subsection (C)(ii). Similarly, the Board quotes, without citation, legislative history stating that the 1997 Amendments eliminate "inappropriate financial incentives for referring children to special education." (Br. 34). This was part of Congress' discussion of §1411, *not* §1412, and refers to the behavior of States, not parents. H.R. Rep. No. 105-95 at 90.

[14] Before the 1997 Amendments, school districts' obligations to children with disabilities enrolled in private schools was unclear. (Cont'd)

While the legislative history of the 1997 Amendments provides little guidance regarding Congress' intent in enacting subsection (C)(ii), it contains no support for the Board's mandatory public school "try-out" theory. Indeed, the absence of any mention of such a new and significant prerequisite for tuition reimbursement makes the Board's argument here completely implausible.

b. The Department of Education Has Rejected the Board's Interpretation

The U.S. Department of Education ("DOE"), the federal agency responsible for administering IDEA, has explicitly rejected the Board's arguments that (1) enrollment in a public school special education program is a prerequisite for seeking private school tuition reimbursement; and (2) subsection (C)(ii) restricts or limits a court's equitable powers under §1415. DOE's interpretation of subsection (C)(ii) was published in the Federal Register, in response to an inquiry during the notice-and-comment rulemaking period concerning implementing regulations for the 1997 Amendments, and is likewise set forth in a letter issued by DOE's Office of Special Education Programs ("OSEP") that was summarized in the Federal Register.

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Compare K.R. by M.R. v. Anderson Cmty. Sch., 81 F.3d 673, 680 (7th Cir. 1996) ("Where the public school makes available necessary service at a public institution ... the public school has discharged its obligation.") *with Fowler v. Unified Sch. Dist. No. 259*, 107 F.3d 797, 807-08 (10th Cir. 1997) ("[T]he District must pay for [interpretive] service an amount up to, but not more than, the average cost to the District to provide the same service to hearing-impaired students in the public school setting.") In enacting §1412(a)(10)(A)(i), Congress imposed a consistent standard: school districts must spend a proportionate amount of their federal funding to serve children in private schools.

During the notice-and-comment rulemaking period following the 1997 Amendments, DOE was asked to clarify whether it would interpret subsection(C)(ii) as barring tuition reimbursement where a child had not previously received "special education and related services under the authority of a public agency." 64 Fed. Reg. 12,537, 12,601-02 (Mar. 12, 1999). In response, DOE stated that "hearing officers and courts retain their authority, recognized in *Burlington* and [*Carter*] to award 'appropriate' relief if a public agency has failed to provide FAPE, including reimbursement and compensatory services, under [§1415] in instances in which the child has not yet received special education and related services." *Id.* DOE explained that this authority, under §1415 and *Carter/Burlington*, "is independent of [courts'] authority under [§1412] to award reimbursement for private placements of children who previously were receiving special education and related services from a public agency."[15] *Id.*

DOE has likewise expressly rejected an interpretation of §1412 that would impose a prior public school "enrollment" requirement on parents seeking tuition

[15] DOE's interpretation – as the "fruits of notice-and-comment rulemaking" – is entitled to deference from this Court under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See United States v. Mead Corp.*, 533 U.S. 218, 237 (2001) (Supreme Court "has recognized a variety of indicators that Congress would expect *Chevron* deference," including "an agency's power to engage in...notice-and-comment rulemaking"). Here, DOE rendered an authoritative interpretation "reflect[ing] the agency's fair and considered judgment on the matter in question." *Auer v. Robbins*, 519 U.S. 452, 462 (1997). Because DOE "focuse[d] fully and directly upon the issue," employed "full notice-and-comment procedures" to provide an interpretation on a matter falling "within the statutory grant of authority," and because the interpretation itself, as demonstrated above, "is reasonable," it is clear that Congress would have intended a court to defer to the DOE's interpretation of subsection(C)(ii). *Long Island Care at Home, Ltd. v. Coke*, 127 S.Ct. 2339, 2350-51 (2007).

reimbursement. In response to a letter asking whether the 1997 Amendments created a requirement that parents "enroll[] their child in a public program as a prerequisite [for private school tuition reimbursement]," DOE's OSEP Director stated:

> We do not view [§1412(a)(10)(C)(ii)] as foreclosing categorically an award of reimbursement in a case in which a child has not yet been enrolled in special education and related services under the authority of a public agency. Reimbursement is an equitable remedy that courts and hearing officers may order in appropriate circumstances. Letter from Thomas Hehir, Director, OSEP to Susan Lugar, C.S.W. (Mar. 19, 1999; *see also* 65 Fed. Reg. 9,178 (Feb. 23, 2000).[16]

Accordingly, the federal agency responsible for administering IDEA has flatly rejected the Board's argument that parents seeking private school tuition reimbursement must enroll their children for some period of time in a public school special education placement.

4. The Circuit Courts That Have Directly Addressed This Issue Have Rejected The Board's Interpretation

Two Circuit Courts have issued holdings as to whether subsection (C)(ii) imposes a prior public school attendance requirement. The Second Circuit (in *Frank G.)* and Eleventh Circuit (in *M.M. v. School Board of Miami-Dade County*, 437 F.3d 1085 (11th Cir. 2006)) have held that subsection (C)(ii)

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[16] The interpretation of subsection (C)(ii) reflected in the OSEP letter is at least "entitled to respect" from this Court under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (applying *Skidmore* to an opinion letter from the Department of Labor, Wage and Hour Division).

imposes no such requirement and does not restrict courts' broad equitable powers under §1415. The First Circuit, in *dicta*, has stated that "tuition reimbursement is only available for children who have previously received 'special education and related services' while in the public school (or perhaps those who at least timely requested such services while the child is in public school)," *Greenland School Dist. v. Amy N.*, 358 F.3d 150, 159-60 (1st Cir. 2004) ("*Amy N.*"), but the First Circuit's decision turned on the issue of notice – "there was no notice at all to the school system....that special education [was] at issue," *id.* – and is thus readily distinguishable from *Tom F.*, where there was ample notice and full cooperation.

a. *Amy N.*'s Holding Relates To Notice, Not Prior Public School Attendance

While the Board claims (Br. 22) that the First Circuit has endorsed its interpretation of the "plain language" of subsection (C)(ii), the Board has misread the holding of *Amy N.* In that case, the parents "unilaterally removed" their daughter Katie from public school and placed her in private school "without ever before raising with Greenland school officials the issue of special education services for Katie." *Id.* at 152. As the First Circuit explained, "[t]he point is that there was *no notice at all* to the school system before Katie's removal from Greenland that there was any issue about whether Katie was in need of special education." *Id.* at 160 (emphasis added). The Court ruled that

> before parents place their child in private school, they must *at least give notice to the school that special education is at issue*. This serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a free

> appropriate public education can be provided in the public schools. *Id.* (emphasis added).

Accordingly, the First Circuit's holding did not, as the Board argues, distinguish between children who had or had not attended public school. Instead, the First Circuit held that parents who do not notify the school district that special education is at issue are not entitled to reimbursement.

The First Circuit likewise did not endorse the Board's mandatory public school "try-out" scheme. Instead, the Court emphasized that providing notice that FAPE is at issue is required, because such notice gives the school an "*opportunity...to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a free appropriate public education can be provided in the public schools.*" *Amy N.*, 358 F.3d at 160 (emphasis added). Tom F. gave such notice, however, and the Board was given a fair opportunity to evaluate Gilbert and propose an appropriate IEP. In short, *Amy N.*'s holding relates strictly to notice, and the one sentence of *dicta* regarding the receipt of services "while in the public school system" is both unnecessary to that decision and not illuminating here.

b. Like The Second Circuit, The Eleventh Circuit Has Ruled That There Is No Prior Public School Attendance Requirement

In *M.M. v. School Board of Miami-Dade County*, 437 F.3d 1085 (11th Cir. 2006), the Eleventh Circuit expressly rejected a school district's argument that subsection (C)(ii) imposes a prior public school attendance requirement as a prerequisite for private school tuition reimbursement. The Eleventh Circuit held that the school district's "[s]ole reliance on the fact that C.M. never attended public school is legally insufficient to deny reimbursement under §1412(a)(10)(C)(ii)" because of the broad equitable powers of courts and

hearing officers under §1415. *Id.* at 1098. According to the Eleventh Circuit, "even when a child has never enrolled in a public school, reimbursement is proper if the School Board [has] failed to offer a sufficient IEP and, in turn, a FAPE." *Id.* at 1099. An interpretation of subsection (C)(ii) that "forc[es] parents into accepting inadequate IEPs in order to preserve their right to reimbursement," the Eleventh Circuit concluded, "runs contrary to the rights recognized in the *Burlington* line of cases." *Id.* Accordingly, the Eleventh Circuit held that if parents of a disabled child request an IEP, and that IEP does not offer FAPE, the child's parents are eligible for tuition reimbursement. *Id.* at 1098-99, 1100-01.

* * * *

There is no support in IDEA, in its legislative history, in its implementing regulations, in DOE's interpretations, or in case law for the Board's argument that parents are required to "try out" an inappropriate public school IEP placement – for some unspecified period of time – in order to qualify for private school tuition reimbursement. Far from relying on the "plain language" of subsection (C)(ii), the Board has sought to engraft additional requirements for this remedy that do not exist in the statutory language.

II. Even If §1412(a)(10)(C)(ii) Requires That All Children Seeking Tuition Reimbursement Have Received "Special Education And Related Services Under The Authority Of A Public Agency," Gilbert F. Received Such Services From The Board

As demonstrated above, subsection (C)(ii) did not change two decades of preexisting law interpreting and defining the remedies available under §1415. Even if subsection (C)(ii) could be read as introducing a new requirement that a child previously have received "special education and related services under the authority of a public agency," however,

Tom F. would still be entitled to reimbursement. Children who are evaluated and assessed by school district personnel as part of the IEP process have received special education services from a public agency. [17] And, as we showed above, IDEA does not require that these services be provided *in a public school.*

A. Children Who Receive IEPs From Their School District Have Received "Special Education And Related Services Under The Authority Of A Public Agency"

This Court has characterized the identification and evaluation of children with disabilities as a *primary* purpose of IDEA. *Board of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 200 (1982) ("Congress sought *primarily to identify and evaluate* handicapped children, and to provide them with access to a free public education.") (emphasis added). To accomplish this purpose, Congress created the IEP process, which it "envision[ed] ... as the *centerpiece of the statute's education delivery system* for disabled children." *Honig v. Doe*, 484 U.S. 305, 311 (1988)

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[17] The Board's *amici* are flatly incorrect in citing §1412(a)(10)(A) for the proposition that children in private schools have no right to FAPE and no right to access the IEP process that leads to the FAPE determination. *See* U.S. Conf. of Mayors Br. at 11-12, 15; New York State School Boards Ass'n Br. at 14-15; Nat'l School Boards Ass'n Br. at 15-16. FAPE is a right that *all* children with disabilities enjoy under IDEA. *See* 20 U.S.C. §1412(a)(1)(A) (requiring States to ensure that "[a] free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21"). Section 1412(a)(10)(A) has no bearing on this case; children who fall under subsection (A) remain in private schools without ever requesting an IEP. In order to begin the IEP process and invoke the full protections of the Act, parents of a child with a disability need only request an evaluation, as did Tom F. *See Winkelman*, 127 S.Ct. at 2000 ("IDEA requires school districts to develop an IEP for each child with a disability.").

(emphasis added). Indeed, the "*modus operandi* of the Act" and "the core of the statute," is the "individualized educational program." *Burlington*, 471 U.S. at 368; *Schaffer*, 126 S. Ct. at 532. Accordingly, the development of an IEP – the "educational delivery system" for children with disabilities – is inextricably linked with special education instruction, and constitutes "special education and related services" under IDEA.

The phrase "special education and related services" is used throughout IDEA to designate the full panoply of services a child with a disability may be entitled to receive. For example, the Act defines a "child with a disability" as one who "by reason of" certain defined disabilities "needs *special education and related services*." 20 U.S.C. §1401(3)(a)(ii). The Congressional Findings appended to the statute also use the phrase, noting that the education of children with disabilities can be "made more effective" by "providing appropriate *special education and related services* . . . to such children." 20 U.S.C. §1400(c)(5)(D). IDEA also states that its purpose is "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes *special education and related services* designed to meet their unique needs." 20 U.S.C. §1400(d)(1)(A).[18] In sum, Congress uses the phrase "special

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[18] The Act uses the same phrase in describing an "educational services agency," *see* 20 U.S.C. §1401(5)(A)(ii); and "free appropriate public education," *id.* at (9); in defining grants to states, *see* 20 U.S.C. §1411(a) ("The Secretary shall make grants to States . . . to assist them to provide *special education and related services* to children with disabilities."); in clarifying states' obligations under "child find," 20 U.S.C. §1412(a)(3)(A)-(B), *id.* at (a)(10)(A)(i), (iii) and (iv); in describing qualifications for special education teachers, 20 U.S.C. §1412(a)(14); in describing the obligations of a local educational agency in order to be entitled to funding, 20 U.S.C. §1413(a)(2) and (4), (f)(4); in outlining evaluation processes, 20 U.S.C. §1414(a)(1)(A), and in many other provisions.

education and related services" as "statutory shorthand" to describe the panoply of benefits available to children with disabilities.

Within the panoply of benefits available to children with disabilities are the evaluative, testing, observation, and educational planning services that make up the IEP, which in turn provides the blueprint for the special education instruction the child will receive. Indeed, IDEA defines "related services" as:

> . . . such developmental, corrective, and *other supportive services* (including speech-language pathology and audiology services, interpreting services, [and] psychological services . . . as may be required to assist a child with a disability to benefit from special education, *and includes the early identification and assessment of disabling conditions in children.* 20 U.S.C. §1401(26) (emphasis added).

IDEA's implementing regulations likewise broadly define "related services" to include "such developmental, corrective, and *other supportive services as are required to assist a child with a disability to benefit from special education.*" 34 C.F.R. § 300.24 also lists several illustrative examples of "related services," including: "early identification and assessment of disabilities in children," "medical services for diagnostic or evaluation purposes," and "psychological services," which is interpreted to include "administering psychological and educational tests, and other assessment procedures" and "interpreting assessment results." Accordingly, IDEA and its implementing regulations define "related services" as including the tests, evaluations, assessments, observations, meetings, review and interpretation of testing, and other services that are necessary to the creation of an IEP.

With the full cooperation and participation of Tom F., the Board provided extensive testing and evaluative services to Gilbert F. in connection with formulating three separate IEPs for Gilbert for the 1997-98, 1998-99 and 1999-2000 school years. During these years, Gilbert was repeatedly examined and observed by Board speech/language pathologists, psychologists, and occupational therapists. He received a full battery of evaluative tests from these professionals aimed at determining his disability and developing an appropriate educational plan. For example, in preparation for the IEP issued by the Board for the 1999-2000 school year – the IEP that immediately preceded this litigation – the Board arranged for: (1) a Board school psychologist to observe Gilbert in his Gaynor reading class; (2) a Board educational evaluator to test Gilbert's competence in reading comprehension, reading decoding, spelling, and math computation; (3) a Board school psychologist to evaluate Gilbert and test his IQ; (4) a Board occupational therapist to assess Gilbert, his gross and fine motor skills, and visual perception; and (5) Board speech/language pathologists to evaluate Gilbert's oral peripheral speech mechanism, the rate and rhythm of his voice, his hearing, his articulation, and his use of language. (J.A. 68a-69a; A. 174-189, 199).

All of this testing, observation and evaluation was in preparation for the Board's CSE meeting at which an IEP for the 1999-2000 school year was developed. These extensive tests and evaluations and the creation of three separate IEPs constitute services related to, and intended to serve and address, Gilbert's educational needs, and therefore are "special education and related services [received] under the authority of a public agency."

B. In Reimbursing Gilbert's Gaynor Tuition For the 1997-98 and 1998-99 School Years, the Board Provided Gilbert With "Special Education and Related Services"

In September 1998 and July 1999, the Board signed settlement agreements with Tom F. in which it acknowledged that Gilbert was "properly classified as learning disabled" and agreed to pay the costs of the special education and related services that Gilbert received at Gaynor. (A. 7, 14). In reimbursing Gilbert's Gaynor tuition for 1997 and 1998, the Board provided Gilbert with "special education and related services under the authority of a public agency."[19] Moreover, the Board remained intimately involved in Gilbert's education while he was enrolled at Gaynor.

The Board's exercise of "authority" over Gilbert's education at Gaynor is evidenced by the language of the settlement agreements. The agreements provided for the Board to remain enmeshed in Gilbert's educational progress, and to provide evaluative and assessment services to Gilbert while he was enrolled at Gaynor. For example, they required Gilbert's parents to "work cooperatively with the CSE" to secure the presence of Gaynor staff at meetings of the CSE. They also required Tom F., during the time Gilbert remained enrolled at Gaynor, to make Gilbert available to the Board for observation, and to make available all records, reports, evaluations, and testing results concerning Gilbert's progress at Gaynor. Finally, the Agreements required Tom F. to consent

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[19] Special education and related services can be provided in a private school, of course, even under a unilateral placement. *See, e.g., Burlington*, 471 U.S. at 359 ("[T]he Act also provides for placement in private schools at public expense."); *P.N. v. Seattle Sch. Dist. No. 1*, 474 F.3d 1165, 1173 (9th Cir. 2007) (noting that parent had "secured some special education benefits for her child" pursuant to settlement agreement in which school district agreed to pay private school tuition for a unilaterally-placed child).

in advance to a new, Board-conducted evaluation at the end of the school year, "for the purposes of recommending a free appropriate public education" for the following year. (A. 7-8).

* * * *

The statutory criteria for tuition reimbursement do not distinguish between a child who has previously received special education and related services in a public school and a child who has received the same services in a different setting. In both instances, the threshold requirements and equitable considerations – primarily adequate notice and parental cooperation – are the same. Where a parent who "has done everything asked of him" by the school district is nonetheless denied FAPE for his child, the lesson of *Burlington* and its progeny is that tuition reimbursement should not be denied.

III. Reading 20 U.S.C. §1412(a)(10)(C)(ii) to Prevent Tuition Reimbursement Where a School District Has Not Provided FAPE Violates IDEA's Primary Purpose

A. The Board's Argument That It May Deny FAPE and Also Deny Private School Tuition Reimbursement is Incompatible With IDEA and This Court's Jurisprudence

Nothing is more central to IDEA than its assurance that all children with disabilities have access to a free and appropriate education. A State receiving funds under IDEA must provide assurance to the federal government that FAPE is available to every resident child with disabilities. *See* 20 U.S.C. §1412(a)(1)(A). Congress enacted this requirement in light of its finding that "improving educational results for children with disabilities is an essential element of our national policy." *See* 20 U.S.C. §1400(c)(1). And this

Court has repeatedly held that any interpretation of IDEA that compromises FAPE cannot be countenanced: "The Act was intended to give handicapped children both an appropriate education and a free one; it should not be interpreted to defeat one or the other of these objectives." *Burlington*, 471 U.S. at 372; *see also Carter*, 510 U.S. at 365 (rejecting interpretation of IDEA that "would defeat this statutory purpose"). The Board's argument that FAPE may be denied to certain children – those who have not previously received "special education and related services" in public school – is utterly antithetical to this core principle.

The risk that children will be denied FAPE without recourse – if the Board's interpretation is adopted – is not merely theoretical. Here, there is no question that Gilbert F. was denied FAPE. The IHO specifically found that the "Board of Education has not offered an appropriate program," and on appeal, the SRO affirmed that decision. (J.A. 34a-36a, 74a-76a). Accordingly, this case squarely poses the question of whether a school district that has failed to offer FAPE may nonetheless force a child into an inappropriate placement, at pain of sacrificing future tuition reimbursement. Such a result would render the IEP process largely meaningless, because even where a school district offers an IEP that does not provide FAPE, parents would nonetheless be required to "give it a try." Such a result "would [likewise] defeat [IDEA's] statutory purpose" of ensuring that every child with a disability receives an appropriate education.

B. Adoption Of The Board's Interpretation Would Lead To Absurd Results, Nullify The Protections IDEA Offers To Children With Disabilities, And Cause Uncertainty And Hardship For School Districts, Parents, And Children

Adoption of the Board's interpretation of subsection (C)(ii) would leave many children who have been denied FAPE with no effective remedy, including children in both public and private schools who – in the Board's view – have not "previously received special education and related services under the authority of a public agency." Such children would include (1) public school students whose disabilities were only recently diagnosed but whose proposed IEP for the following school year does not provide FAPE; (2) public school students who were promised certain services under an IEP but who have not timely received those services; and (3) children entering public school for the first time who were not identified through IDEA's "child find" provision.[20] Many private school students such as Gilbert F. will likewise be left with no remedy, including, for example, children with disabilities who have never been enrolled in public school but whose family can no longer afford the cost of private school tuition.

The Board's interpretation of subsection (C)(ii) would deny the tuition reimbursement remedy to all of these children's parents even if they gave notice to the school

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[20] The claim by the U.S. Conference of Mayors et al. (at 21) that no such children exist, because all disabled preschoolers receive special preschool education under §1419 of IDEA and thus will have "previously received special education," is unduly optimistic. It is precisely those preschool-age children who have been overlooked or late-diagnosed who might require the opportunity to receive appropriate education at an alternative setting once they reach school age. Yet, according to the Board's interpretation of IDEA, it is precisely those children who have no right to that remedy.

district that special education was at issue and cooperated in good faith with the school district's development of an IEP. The Board's blithe dismissal of the children who will fall through the cracks as "rare" and unavoidable victims of the Board's statutory construct is unacceptable. FAPE is not an aspiration, but a requirement. IDEA mandates that *all* children with disabilities – not just some – receive FAPE and the other protections of the Act. The Board's interpretation cannot be reconciled with this statutory purpose.

The Board's assurance that children like Gilbert F., and those described in the examples above, will still be protected by other aspects of IDEA – notwithstanding the inability to obtain private school tuition reimbursement – is illusory. When a school district has demonstrated that it is incapable or unwilling to provide FAPE to a student, resort to an appropriate private school and relief in the form of tuition reimbursement may be the only viable option. Further "collaboration" between the parents and the school board, recommended by the Board's *amici* (Nat'l School Boards Ass'n Br. 17-28; U.S. Conf. of Mayors Br. 4, 7), makes little sense where a parent has determined that a child needs a particular accommodation that the school district is not offering. Here, for example, further "collaboration" would not have remedied the Board's failure to provide FAPE to Gilbert. His father concluded (and an IHO agreed) that Gilbert needed a math class consistent with his abilities and with an appropriate teacher-student ratio, which the Board's placement could not provide. And the "second chance" to provide FAPE that the Board is truly seeking here constitutes, as the Second Circuit noted, the child's "first bite at failure." *Frank G.*, 459 F.3d at 372.

Finally, the "try-out" period that the Board attempts to graft onto subsection (C)(ii) – aside from having no textual support – creates more problems than it solves, and could not have been what Congress intended. First, the Board has no explanation, and no statutory answer, for how long the

"try-out" period should last. As a result, school districts and parents will inevitably battle over the length of time that a disabled child must remain in an inappropriate public school placement before the statute is satisfied. The indeterminate length of the allegedly mandatory "try-out" period highlights the incongruity of the Board's interpretation; forcing children to make a ceremonial appearance in public school in order to qualify for tuition reimbursement accomplishes nothing.

Second, whether the "try-out" period lasts a day or a year, the burden of the inappropriate placement will fall squarely on the child's shoulders. As one court stated: "[c]hildren are not static beings; neither their academic progress nor their disabilities wait for the resolution of conflicts." *Susan N. v. Wilson Sch. Dist.*, 70 F.3d 751, 760 (3d Cir. 1995). Even a short period in an inappropriate educational setting can have profoundly negative consequences for a child's development, particular for children with more severe disabilities, as the *amici* briefs filed in support of this brief vividly demonstrate.

The Board's interpretation of the statute likewise cannot be reconciled with the reality of modern education. Parents need to know where their children will be attending school in the upcoming school year; they cannot drop in or out of schools on a whim. Private schools, especially those in urban areas, often have long waiting lists and demand down payments well in advance. Requiring a public school "try-out" period will force parents to enroll their child at the beginning of the school term in a public school, and then require them to attempt a transfer to a private school once the mandatory try-out period – however long it might be – is over. At the very least, this will mean serious disruption in the child's education. At worst, the child could lose his or her place at the private school altogether, and have no choice but to remain for the entire year in the inappropriate public school placement.

C. Adequate Safeguards Exist Against "Gaming The System," And The Board Has No Valid Cost Reduction Argument

IDEA and the case law interpreting it have imposed strong safeguards against parents who might seek to "game the system." As this Court has stated, "[p]arents who unilaterally withdraw their child from the public school and thereafter seek tuition reimbursement for the[ir] child's private placement do so at their own peril," because they bear the financial risk, both as to tuition and legal expense, *and* the burden of demonstrating all three requirements for relief. *Burlington*, 471 U.S. at 373-74; *Schaffer*, 126 S. Ct. at 537. This statutory construct is a significant deterrent to false or speculative claims. *See Winkelman v. Parma City Sch. Dist.*, 127 S. Ct. 1994, 2011 (2007) (Scalia, J., dissenting) ("actions seeking reimbursement are less likely to be frivolous, since not many parents will be willing to lay out the money for private education without some solid reason to believe the FAPE was inadequate").

The current IDEA framework also addresses the Board's and *amici*'s concerns that parents may seek an IEP and later challenge its adequacy, even though they have no intention of placing their child in public school.[21] To the extent that a

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[21] Contrary to the Board's and *amici*'s claims (Br. 36; Great City Br. 25), there is no evidence that any gaming of the system occurred here. Tom F. did not testify that he had "predetermined . . . to reject the public placement" – as the Board argues without citation. (Br. 36). Moreover, both the IHO and SRO found that Tom F. had fully cooperated with the Board and done "everything asked of him." (J.A. 35a). Gilbert and Tom F. cooperated with a full battery of intensive testing and assessments in connection with three separate IEPs, and Tom F. attended all required meetings with the CSE. While the Board and *amici* (Br. 9, 13; Great City Br. 25) criticize Tom F. for his failure to visit P.S. 871 in July – when the Board issued the

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parent's claim for tuition reimbursement lacks good faith, courts are fully authorized to consider this factor. Tuition reimbursement is an equitable remedy, and "equitable considerations [including those in subsection (C)(iii)] are relevant in fashioning relief." *Burlington*, 471 U.S. at 374; *Carter*, 510 U.S. at 16. Indeed, courts have rejected tuition reimbursement claims from parents who appear to be gaming the system. *See, e.g., Carmel Central Sch. Dist. v. V.P. ex rel G.P.*, 373 F. Supp. 2d 402 (S.D.N.Y. 2005) (rejecting claim for tuition reimbursement where parents "never had the slightest intention of allowing the child to be educated in the public school [and] did everything possible to frustrate a timely review of [her] condition").

Finally, there is no evidence that States are being overwhelmed by tuition reimbursement claims, nor is there any evidence that rejecting the Board's interpretation of subsection (C)(ii) will have an "enormous economic impact," as the Board alleges. (Br. 41). According to 2004 data from the U.S. Department of Education, only 1.5% of all children with disabilities are educated in private school at public expense. This number has remained essentially unchanged over the past fifteen years. *See Debunking A Special Education Myth*, Greene, J.P. and Winters, M.A., in EDUCATION NEXT, No. 2 at 68 (2007). And most of these children were placed in private school by a public authority, and not unilaterally by their parents. *Id.* Furthermore, data from 2000 shows that the money spent by public schools for private placements of disabled children amounted to only 0.24% of their entire budget of $382 billion. *See* Greene and Winters at 70.

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placement and when the school was closed for the summer – there would have been nothing to observe at that time. If the Board had offered a placement that Tom F. could have observed, he testified that he would have done so. (A. 237). Most importantly, the IEP provided by the Board was inappropriate on its face.

Moreover, the Board and its *amici* have vastly overstated the cost difference between educating a particular child with disabilities in private school as opposed to public school. Council of the Great City Schools asserts that public schools on average spend five times as much on students receiving special education in private schools as they do on students receiving special education in public schools. *See* Great City Br. 20. But this is an "apples and oranges" comparison; it ignores the fact that children with severe disabilities are disproportionately placed in private schools *by school districts* because they require more services, and therefore more funding. *See* Greene and Winters at 69. Furthermore, as to children with less serious disabilities, it is far from clear that school districts will save money by educating such children in public school instead of reimbursing private school tuition. In 1999-2000, for example, New York City expended an average of $26,497 per child for special education at public schools. *See* New York City Department of Education Office of Financial and Management Reporting, School-Based Expenditure Reports, School Year 1999-2000.[22] Gilbert F.'s private school tuition for that year was $21,819 – $4,678 ***less*** than what it would have cost the average New York City public school to educate him.

In sum, the Board has not established that Congress' intent in enacting subsection (C)(ii) had anything to do with cost; it has not established that a public school education costs less for a child suffering from Gilbert's disabilities; and it has not explained how requiring children with disabilities to attend public school for a week or some other indeterminate time period will reduce its costs. Finally, this Court dispositively answered the Board's cost argument fourteen years ago:

> There is no doubt that Congress has imposed a significant financial burden on States and school

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[22] Available at http://www.nycenet.edu/offices/d_chanc_oper/budget/exp01/y1999_2000/FY2000T1.asp.

> districts that participate in IDEA. Yet public educational authorities who want to avoid reimbursing parents for the private education of a disabled child can do one of two things: give the child a free appropriate public education in a public setting, or place the child in an appropriate private setting of the State's choice. *This is IDEA's mandate, and school officials who conform to it need not worry about reimbursement claims.* *Carter*, 510 U.S. at 15 (emphasis added).

IV. States Are On Clear Notice That If They Do Not Provide FAPE, They Are Potentially Liable For Private School Tuition Reimbursement

The Board claims that it was not on notice that it might have "an obligation to reimburse parents who unilaterally place their children in private school when those children have never previously received special education and related services from the local educational agency." (Br. 40-41). Accordingly, the Board argues, under the Spending Clause and this Court's decision in *Arlington Cent. School Dist. Board of Educ. v. Murphy*, 126 S. Ct. 2455 (2006), the tuition reimbursement remedy is not available to parents of such children. The Board cannot prevail on this argument for several reasons.

First, the Board did not raise this argument below, and thus has waived it. *See, e.g., Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002); *Bath Iron Works Corp. v. Director, Office of Workers' Compensation Programs, U.S. Dept. of Labor*, 506 U.S. 153, 162 n.12 (1993). Second, the Board ignores the fact that school districts have been on notice since *Burlington* that they are potentially liable for private school tuition reimbursement if they do not provide FAPE, and nothing in §1412(a)(10)(C)(ii) alters this core principle of IDEA. Finally, the Board has not explained how

Respondent's interpretation of subsection (C)(ii) imposes a greater burden on the States, or conversely how the Board's interpretation will lead to less of a financial burden.

A. The States Have Been On Notice At Least Since *Burlington* That They Are Potentially Liable For Tuition Reimbursement Where They Have Not Provided FAPE

In *Burlington*, this Court held that courts reviewing challenges to IEPs have broad discretion, under §1415, to "grant such relief as the court determines is appropriate," and that "Congress meant to include retroactive reimbursement to parents as an available remedy" where FAPE has not been provided. *Burlington*, 417 U.S. at 370. The States have thus been on notice since *Burlington* that they could be liable for reimbursement of private school tuition *if they did not provide FAPE* to children with disabilities whose parents request development of an IEP.[23]

The Board pretends that none of this history exists, and does not even cite *Burlington* in its Spending Clause argument. Instead, it reads §1412(a)(10)(C)(ii) in a vacuum, suggesting that its addition to the Act in 1997 was entirely without context and rendered the statute "ambiguous" as to the tuition reimbursement right. (Br. 40-41). As we showed

[23] States looking to discern potential liabilities under a Spending Clause statute must consider how that statute has been authoritatively interpreted by this Court. *See, e.g., Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 182 (2005) ("Funding recipients have been on notice that they could be subjected to private suits for intentional sex discrimination under Title IX since 1979, when we decided *Cannon*."); *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 643 (1999) (finding that Supreme Court precedent, the regulatory scheme surrounding Title IX, and the common law all put schools on notice that they could be held responsible for failure to respond to student-on-student sexual harassment). Thus, any discussion of whether states were "on notice" of their obligations under IDEA must include *Burlington*.

in Point I above, the Board has not demonstrated that subsection (C)(ii) was intended to restrict §1415 or otherwise overrule *Burlington*. Rather, the 1997 Amendments codified *Burlington* and 20 years of subsequent jurisprudence in which parents' notice and cooperation obligations were delineated. Given that there is no indication in subsection (C)(ii), in its legislative history, or in DOE's implementing regulations that this provision was intended to limit the tuition reimbursement remedy to children who had attended public school, no state official would have been justified in making that assumption.[24] Stated another way, after the 1997 Amendments, State officials remained on notice that States could be liable for tuition reimbursement where an IEP did not offer FAPE, a private school placement was appropriate, and the equities favored the parent.

Arlington requires no different result. In that case, this Court considered whether IDEA – which explicitly grants courts the discretion to "award attorneys' fees as part of the costs" to prevailing parties – also authorized an award of expert fees. Noting that the statute said nothing about expert fees and that "'costs' is a term of art that generally does not include expert fees," this Court declined to impose this obligation on the States. *Arlington*, 126 S.Ct. at 2459-61. Nothing in *Arlington* supports the Board's Spending Clause argument here, however.

First, the Board ignores *Burlington*'s holding that §1415 gives courts broad discretion to grant the tuition reimbursement remedy, and that there is no evidence that subsection (C)(ii) was intended to abrogate that holding. Second, unlike the expert fees dispute in *Arlington*, the issue here relates to the mandate "most fundamental to the Act: the provision of a free appropriate public education to a child with a disability." *Winkelman*, 127 S. Ct. at 2004. In arguing

[24] Indeed, New York officials drew the opposite conclusion.

that parents must place their children in an inappropriate public school placement in order to qualify for tuition reimbursement, the Board is striking at and undermining the "core purpose" of IDEA: the guarantee of an appropriate education for all children with disabilities.

At least since *Burlington*, States have known that when they do not provide FAPE, they can be liable for private school tuition reimbursement. There is nothing new about this obligation. "The basic measure of monetary recovery [remains the same]," and Respondent's interpretation of the Act does "not impose any substantive condition or obligation on States [that] they would not otherwise be required by law to observe." *Winkelman*, 127 S. Ct. at 1997. States were also well aware of this Court's jurisprudence rejecting attempts to interpret IDEA in a manner that would deny either a free or an appropriate education to children with disabilities. *Burlington*, 471 U.S. at 372 (IDEA "should not be interpreted to defeat one or the other of those objectives"); *see also Carter*, 510 U.S. at 365. Because States have always had clear notice of their potential liability where they did not offer FAPE, there is no notice issue and therefore no Spending Clause issue for this Court to address.

B. There Is No New Financial Obligation To Consider Under The Spending Clause

The Board's Spending Clause argument also fails because the Board cannot establish that Respondent's interpretation of the statute imposes a greater financial burden on school districts. The Board never explains how its alternative statutory interpretation of subsection (C)(ii) would actually save public schools money. Without such proof, "[t]he basic measure of monetary recovery [has] not [been] expanded," and there is no Spending Clause issue to consider. *Winkelman*, 127 S. Ct. at 1997.

The mandatory public school "try-out" period that the Board reads into the statute will not insure that tuition reimbursement claims will decline, or that school districts will save money. *See supra* page 43. Accepting the Board's interpretation will not prevent parents from placing their child in private school and seeking reimbursement; it will merely delay that remedy for the length of the "try out," which could be as short as a day.

Similarly, there is no reason to believe that imposition of the "try-out" period will have the intended practical effect of decreasing tuition reimbursement claims. Every tuition reimbursement claim arises in a context in which parents have already decided that the IEP for their child does not offer FAPE. The Board's suggestion that the deficiencies of the placement will somehow cure themselves during the "try-out" period is dubious and unsupported. Moreover, if the school district had the means and desire to improve its educational offering and address the parents' concerns, that surely would have emerged during the IEP process. Any "try-out" is likely to be unsuccessful and brief.

Ironically, the Board's interpretation of subsection (C)(ii) would likely impose a *greater* financial burden on public schools. School districts must allocate resources – *e.g.*, physical space, teacher salaries, books and supplies, school lunches, athletic and social programs – for every child educated within the system. If all children with disabilities must "try out" public school placements, school districts will have to allocate classroom resources for the education of these children, even where it is likely that they will not remain enrolled in public school. By forcing such children to endure the inappropriate public school placement for a day, a week, or a month, the school district wastes the resources allocated to these children if they subsequently transfer to a private school.

Even accepting the dubious proposition that public schools can always service children with disabilities at less cost than private schools, the Board's interpretation of subsection (C)(ii) does not promise true cost savings to school districts, and thus the Board has no Spending Clause argument. The mandatory public school "try-out" period advocated by the Board will cause public schools as well as parents and children to suffer enormous disruption and needless expense, all to no end. School districts will remain liable for private school tuition reimbursement where their IEPs do not offer FAPE and private school placements are appropriate.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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